

[HIGH COURT OF AUSTRALIA.]

PHILLIPS . . . . . APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXA- }  
TION . . . . . } RESPONDENT.

H. C. OF A. *Income Tax—Assessable income—Premium—Goodwill—Newsagency business—*  
1947. *Lease—Sale of goodwill attached to or connected with the land—Assignment or*  
*transfer of lease—Lease terminated and weekly tenancy granted—Surrender of*  
SYDNEY, *lease—Income Tax Assessment Act 1936-1944 (No. 27 of 1936—No. 28 of*  
Dec. 2, 12. *1944), ss. 83, 84\*, 85.*

Williams J.

In April 1939, the appellant purchased a newsagency and paid £3,266 for the goodwill. At about the same time he was granted by the landlords of the shop a lease for a term expiring on 16th May 1944. On 23rd March 1944 the appellant contracted in writing to sell the newsagency including the goodwill which was to be computed on the basis of the average circulation of newspapers. The contract provided, *inter alia*, that the appellant should arrange for the purchaser to be accepted by the landlords as the tenant of the shop as from the date of completion of the sale. Both parties to the contract believed that the lease granted in April 1939 would expire on 30th April 1944. Negotiations took place between the purchaser and the landlords, with the consent of the appellant, with the result that the purchaser became the weekly tenant of the

\*The *Income Tax Assessment Act 1936-1944* provides :—

By s. 83 : “ In this Division ‘ lease ’ when used in relation to a premium means the lease granted, assigned or surrendered, or where the premium is for or in connexion with any goodwill or licence means the lease of the land to which such goodwill or licence is attached or connected . . . ‘ premium ’ means any consideration in the nature of a premium fine or foregift payable to any person for or in connexion with the grant or assignment by him of a lease, or any consideration

for or in connexion with the surrender of a lease, or for or in connexion with any goodwill or licence attached to or connected with land a lease of which is granted, assigned or surrendered . . . . ”  
By s. 84 (1) : “ The assessable income of a taxpayer shall . . . include, in addition to rent, any premium received by him in the year of income, and any consideration so received for or in connexion with his assent to any grant or assignment of a lease.”



shop from 30th April 1944. The lease was never assigned. The appellant received for the goodwill a sum which exceeded by £854 the amount paid by him for the goodwill in 1939. The Commissioner included this sum of £854 in the appellant's assessable income for the year ended 30th June 1944 pursuant to s. 84 of the *Income Tax Assessment Act 1936-1944*.

*Held* that the sum of £854 did not form part of the appellant's assessable income on the grounds:—(i) That the real value of the goodwill of such a business did not attach to the land within the meaning of s. 83 (1) of the Act but consisted in the appointment of the proprietor as the exclusive agent for the newspaper companies; (ii) that the creation of the weekly tenancy operated as a surrender of the appellant's lease but that such surrender and the creation of such weekly tenancy did not amount to a granting or surrendering of a lease within the meaning of the relevant words.

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APPEAL under the *Income Tax Assessment Act*.

In April 1939, the appellant purchased a newsagency business at Chatswood, New South Wales, and paid the sum of £3,266 8s. for the goodwill. The business was carried on on premises leased for that purpose for a term of years. The appellant sold the business in March 1944 under a contract in writing. The goodwill was valued in pursuance of the contract at the sum of £4,120 19s. so that the appellant received for the goodwill the sum of £854 more than he had paid for the goodwill in 1939. On 30th April 1944, the date on which the purchaser was to enter into possession, the lease granted to the appellant had still sixteen days to run but both parties to the contract believed that the lease would expire on 30th April and the contract was entered into on this basis. The lease was never assigned by the appellant to the purchaser who, after negotiations, became the weekly tenant of the shop as from 30th April 1944.

In his assessment of the appellant in respect of income derived during the year ended 30th June 1944, the Commissioner included the said sum of £854 in the appellant's assessable income as income from property on the ground that it was a net premium received in connection with the assignment of the business premises.

An objection by the appellant having been disallowed he appealed to the High Court.

Further material facts and the relevant statutory provisions appear in the judgment hereunder.

*Ferguson* K.C. and *O'Meally*, for the appellant.

*A. C. Leslie*, for the respondent.

*Cur. adv. vult.*



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Dec. 12.

WILLIAMS J. delivered the following written judgment :—

In April 1939 the appellant purchased from W. C. Allen the newsagency business which Allen was then carrying on at 390 Victoria Avenue, Chatswood. He paid £3,266 8s. for the goodwill. At about the same time he was granted a lease of this shop by the landlords for a term of four years and eleven months, expiring on 16th May 1944. On 23rd March 1944 he contracted in writing to sell this business to MacDowall, the contract providing that possession should be given to the purchaser on 30th April 1944. Clause 2 of the contract provided that the vendor would sell and the purchaser would buy the goodwill of the business (including vendor's interest in newspapers and all other agencies); such tenant's fixtures, fittings, plant and chattels on the premises as might be included in an inventory to be approved by a certain firm of accountants; and the stock on hand on the date of possession. Clause 6 provided that the accountants should report to John Fairfax Pty. Ltd., Associated Newspapers Ltd. and Consolidated Press Ltd. (hereinafter called the newspaper companies) the number of units of circulation which should, in the opinion of the accountants, be taken as the fair average weekly circulation of the business and the price of the goodwill should be the amount of the valuation thereof to be made by the newspaper companies on the basis of such calculation or such other basis as they thought fit. Clause 7 provided that the price for the tenant's fixtures, fittings, plant, chattels and stock should be the valuation determined by the valuer appointed by the parties and approved by the newspaper companies. Clause 10 (a) provided that the vendor should arrange for the purchaser to be accepted by the landlords as the tenant of 390 Victoria Avenue as from the date of completion, and that the purchaser should pay such reasonable expenses, if any, as might be incurred by the vendor in procuring such acceptance. Clause 21 provided that the contract was subject to the newspaper companies intimating in writing to the accountants on or before the date of completion their approval of the purchaser and of the total purchase price to be paid under the contract.

The goodwill was valued in pursuance of the contract at £4,120 19s., so that the appellant received for the goodwill £854 more than he had paid for the goodwill in 1939. In the assessment of the appellant for the financial year 1st July 1944 to 30th June 1945 in respect of income derived during the year of income ended 30th June 1944, the respondent included this sum of £854 in the assessable income of the appellant as income from property on the ground that it was a net premium received in connection with the assignment



of the business premises. The appellant objected to the inclusion of this sum in his assessable income, but the objection was disallowed. He then appealed to this Court, and the question for decision is whether this sum was rightly included or not.

The respondent relies on s. 84 of the *Income Tax Assessment Act* 1936-1944, which provides that the assessable income of a taxpayer shall include any premium received by him in the year of income. He only claims that the sum of £854 is assessable because he has allowed as a deduction from the £4,120 19s. under s. 85 of the Act the sum of £3,266 8s. which the appellant paid to purchase the goodwill in 1939.

Section 83 of the Act defines "premium" to mean:—"any consideration in the nature of a premium fine or foregift payable to any person for or in connexion with the grant or assignment by him of a lease, or any consideration for or in connexion with the surrender of a lease, or for or in connexion with any goodwill or licence attached to or connected with land a lease of which is granted, assigned, or surrendered; and where any of the foregoing considerations is payable in more than one amount each such amount shall be deemed to be a premium."

The material words in this section are "any consideration in the nature of a premium paid for . . . any goodwill attached to . . . land a lease of which is granted assigned or surrendered." Three conditions must be fulfilled before the £854 can be a premium within the meaning of these words: (1) the consideration in the nature of a premium must have been paid for goodwill; (2) this goodwill must have been attached to 390 Victoria Avenue; (3) a lease of this land must have been granted assigned or surrendered.

The appellant does not dispute that the £4,120 19s. could be a consideration in the nature of a premium, but he objects to the inclusion of the £854 in his assessable income on the grounds: (a) that it was not paid for any goodwill attached to 390 Victoria Avenue; and (b) that even if the goodwill was so attached no lease of this land was granted assigned or surrendered within the meaning of the relevant words. The respondent contends that the goodwill of the newsagency business was attached to this land because it was there that the business was being carried on. In the adjustment sheet forwarded with the notice of assessment it was stated that a lease of this land had been assigned. On 30th April 1944, the date on which the purchaser was to enter into possession, the lease granted to the appellant had still sixteen days to run, but both parties to the contract believed that this lease would expire on 30th April, and the contract was entered into on this basis. This lease

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was never assigned by the appellant to MacDowall. Counsel for the respondent was therefore unable to rely on an assignment. But negotiations took place between MacDowall and the landlords with the consent of the appellant with the result that the purchaser became the weekly tenant of the shop from 30th April 1944, and in my opinion this operated as a surrender of the existing lease by the appellant to the landlords: *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 272. Accordingly counsel for the respondent submitted that a lease had been surrendered, or alternatively that a lease had been granted within the meaning of the relevant words.

I shall now proceed to examine both grounds of objection.

(a) There was no particular advantage in the shop being situated at 390 Victoria Avenue. At one time Allen was carrying on business in another shop. The agreements between the agent and the newspaper companies did not require the agent to carry on business in any particular shop. All that they provided was that the agent should not appoint any sub-agent or supply any agent or sub-agent with any of their publications without their consent in writing, and that the agent should not in any way directly or indirectly dispose of, deliver or supply beyond the limits of the area assigned to him. The shop could therefore be situated at any convenient place in the area. The newspapers and other publications, particularly the newspapers, are sold chiefly by delivering them at the houses of the residents in the area. The area contains a number of persons who would naturally purchase such publications locally, and the absence of competition ensures that they will purchase from the sole local agent. Accordingly the real value of the goodwill of such a business lies in the appointment of the proprietor as the exclusive agent of the newspaper companies to purchase their newspapers and other publications wholesale and to sell them retail in the prescribed area, or in other words in the agent being the sole source of supply in that area. It is a case in which, in the words of Lord *Eldon* in *Kennedy v. Lee* (1), "the good-will of a trade follows from, and is connected with, the fact of sole ownership."

(b) The definition of premium in s. 84 includes three limbs. (i) Any consideration in the nature of a premium fine or foregift payable to any person for or in connection with the grant or assignment by him of a lease. The words "by him" make it plain that this consideration must be received by the person who grants or assigns the lease. (ii) Any such consideration for the surrender of a lease. The consideration for the surrender of a lease would ordinarily be a payment by the landlord to the tenant. In some

(1) (1817) 3 Mer. 441, at p. 452 [36 E.R. 170, at p. 174.]



cases, for instance in that of an onerous lease, the tenant might make a payment to the landlord to induce the latter to surrender the lease, but it would not be an ordinary use of language to describe such a payment as in the nature of a premium fine or foregift. A lessee of premises to which a valuable goodwill was attached would not be likely to make a payment in the nature of a premium to a landlord to obtain a surrender of the lease. The only natural application of the words in such a context is to a payment by a landlord to the tenant. The words "by him" would not be appropriate in this limb. (iii) Any such consideration for any goodwill or licence attached to or connected with land a lease of which is granted assigned or surrendered. The question is whether to fall within this limb the payment for the goodwill must be made to the grantor or assignor of the lease by the lessee or assignee, or to the lessee who surrenders the lease by the landlord. Counsel for the respondent relied on the absence of the words "by him" from this limb of the definition and contended that it was sufficient that a lease of the land was granted assigned or surrendered as part of the transaction. But these words would be quite inappropriate in a collocation of words which include surrendered as well as granted and assigned. A purchaser of a goodwill attached to land would require a title to the possession of the land. He might acquire such a title by purchasing the land, but s. 83 is not concerned with the acquisition of freehold but only with the acquisition of leasehold titles. If the purchaser purchased the goodwill from the owner of the land he could require the owner to grant a lease. If he purchased the goodwill from a lessee, the lease could be assigned. But he could also acquire a leasehold title as in the present case by the vendor of the goodwill surrendering his existing lease to the landlord and the landlord granting a new lease to the purchaser. But in this case it would be only natural for the landlord to insist upon the payment of a premium to him as consideration for the grant of the new lease. The third limb includes the case of a licence as well as that of a goodwill attached to or connected with land. The effect of a licence is to make an act lawful which without it would be unlawful. A licence attached to or connected with land must therefore be an authority to do some act on that land which would otherwise be unlawful, as for instance to carry on the business of a publican on premises which require to be licensed under the Liquor Acts of the States. Land to which a goodwill or licence is attached has a special value in addition to its ordinary improved value. Any payment although made separately for the right to enjoy this special value for the same term or residue of the term as that of

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the lease granted or assigned is of the same nature as a bonus for the grant or assignment of the lease and is therefore placed in the same category for the purposes of income tax. So too payments made by a landlord to obtain a surrender of a lease of land to which a goodwill or a licence is attached are of the same nature whether there is a separate payment for the value of the goodwill or licence or it is included in a single payment for the surrender. The whole payment is made to obtain immediate possession of land which has a special value instead of leaving the possession outstanding for the balance of a term. In my opinion the natural grammatical construction of the third limb is that the payment for the goodwill or licence must be made by the person to whom the lease is granted assigned or surrendered to the person who grants assigns or surrenders the lease. This construction harmonises with ss. 85 and 88 of the Act. In particular ss. 85 (1) (b) and 88 (1) (b) clearly indicate that the consideration in the nature of a premium paid for the surrender of a lease must move from the landlord to the tenant.

In the present case the £4,120 19s. was not paid by the landlords to the appellant to induce him to surrender his lease, and it was not paid by MacDowall to the landlords to induce them to grant him a lease. It was not paid to the landlords at all. It was not therefore a consideration within the meaning of the third limb. It was a payment made by MacDowall to the appellant because he and not the landlord owned what was of real value, namely the personal right to carry on business as the exclusive agent of the newspaper companies in a certain area and to transfer that right to a purchaser of whom and at a price of which they approved. The goodwill of this business was attached to the area within the boundaries of which it was confined. But it was not in any way attached to any particular premises in that area.

For these reasons I am of opinion that the appellant is entitled to succeed on both grounds.

*Appeal allowed with costs. Order respondent to amend the assessment under appeal by excluding the sum of £854. Liberty to apply.*

Solicitors for the appellant, *McMaster, Holland & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.